Supreme Court, U. S.
FILED
AUG 16 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term
1975

No. 76-88

EDWIN T. POGUE, WARDEN, Nevada State Prisons,
Petitioner,

vs.

SYLVESTER JACKSON AZBILL,
Respondent.

OBJECTION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRY E. CLAIBORNE
Attorney at Law
108 S. Third Street
Las Vegas, Nevada
Attorney for Respondent

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

Pages

Additions to Statement of the Case 2

Reasons for Denying the Writ 3

A. This court should determine that *Davis v. Alaska,* 415 U. S. 308 (1974) should be held to be retroactive in its effect. 3

B. The Ninth Circuit properly applied the decision of this court in *Davis v. Alaska,* 415 U. S. 308 (1974) 5

Conclusion 6

CITATIONS

Cases:

Davis v. Alaska, 415 U. S. 308 (1974) 3, 4, 5

Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772 (1966) 4

Gideon v. Wainright, 372 U. S. 335, 83 S. Ct. 792 4

Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731 4

Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967 (1967) 4

Tehan v. United States ex rel. Shott, 382 U. S. 406, 86 S. Ct. 459 (1966) 3, 4

In The

Supreme Court of the United States

October Term
1975

—o—

No. .....

—o—

EDWIN T. POGUE, WARDEN, Nevada State Prisons,
Petitioner,

vs.

SYLVESTER JACKSON AZBILL,
Respondent.

—o—

OBJECTION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

Respondent admits so much of said Petitioner's brief as refers to the jurisdiction of the court, the questions presented and the constitutional statutory provisions involved.

—o—

ADDITIONS TO STATEMENT OF THE CASE

Respondent wishes to correct the Statement of the Case presented by Petitioner in the following respects:

Wherein Petitioner alleges in the Statement of the Case that the principal defense of Defendant to the murder charge was that Rose Azbill had died prior to setting of the fire, in truth and in fact Defendant denied categorically that he had ever set the fire and as a second defense relied on the fact that Rose Azbill had died prior to the setting of the fire and that her death, in any event, was caused by the synergistic effect of phenobarbital and alcohol found in her body by the deputy coroners and pathologist.

Respondent further wishes to amend said Statement of the Case and add thereto the fact that Brad Azbill was not only involved in a car theft in the State of Nevada and theft of stolen credit cards in the State of Nevada, but was arrested in California for interstate transportation of the stolen car and the stolen credit cards.

Further, as an addition to said Facts, Respondent wishes to assert that at the time of the trial, counsel for Respondent attempted to show not only that Brad Azbill had never been prosecuted for these alleged offenses, but that he had never even been taken to juvenile home in Las Vegas, Nevada, after his return from California, nor subject to an arraignment in the juvenile home for such alleged crimes.

It should further be pointed out to the Court that the order of the trial court on the "Motion in Limine" was to the effect that defense counsel could not inquire into the

particular facts surrounding the above juvenile offenses and not restricting counsel from inquiring about *any* juvenile offenses.

Contrary to the Statement of Facts of Petitioner, the order of the Court was not a pretrial order, but was entered after the prosecution had completed its interrogation of Brad Azbill in the course of the trial.

REASONS FOR DENYING THE WRIT

A. This court should determine that Davis v. Alaska, 415 U. S. 308 (1974) should be held to be retroactive in its effect.

While nothing in the case of *Davis v. Alaska,* 415 U. S. 308 (1974) requires it to be applied retroactively, it appears to Respondent that Petitioner has misconstrued the cases as cited to support his position that *Davis v. Alaska* should not be held to be retroactive in its effect.

The case of *Tehan v. United States ex rel. Shott,* 382 U. S. 406, 86 S. Ct. 459 (1966) is not applicable to this case, since the constitutional question of commenting on Defendant's failure to testify which was the constitutional question involved in the *Tehan* case was not raised prior to the date of the subsequent U. S. Supreme Court's decision holding such comment to be a violation of Defendant's constitutional rights; and judgment of conviction in the *Tehan* case was final long before the decision in said case. In

the case at bar, the question of restriction of right of cross-examination of Brad Azbill was raised at the State Trial Court level, immediately after Brad Azbill's direct testimony on behalf of the State in the appeal to the State Supreme Court and in all Federal proceedings, and was not on appeal to the Ninth Circuit at the time of the *Davis* decision.

In addition thereto, in the case at hand we deal with a doctrine which rests on considerations of a different order from those underlying the principle involved in the *Tehan v. United States ex rel. Shott,* 382 U. S. 406, 86 S. Ct. 459 (1966); *Stovall v. Denno,* 388 U. S. 293, 87 S. Ct. 1967 (1967); and the case of *Johnson v. New Jersey,* 384 U. S. 719, 86 S. Ct. 1772 (1966) relied upon by Petitioner, and more clearly follow within the doctrine of the case where the ability to determine the truth of testimony was impaired, the violation of which rights create a clear danger of convicting the innocent. See: *Gideon v. Wainright,* 372 U. S. 335, 83 S. Ct. 792 and the "very integrity of the fact finding process" is impaired. See *Linkletter v. Walker,* 381 U. S. 618, 85 S. Ct. 1731.

Further, Petitioner's statement that a retroactive application of the U. S. Court's opinion may overturn many convictions and seriously disrupt the administration of justice is pure speculation and not based upon any facts in the record or any facts submitted to this Court.

In no way could the application of the rule of the case of *Davis v. Alaska,* 415 U. S. 308 (1974) undermine the State's interest in anonymity. In the matter before the Trial Court, the testimony of the witness in question, Brad Azbill, was first utilized by the State, as a witness in its

case in chief, and the evidence sought to be elicited by the defense was not as to a conviction of a juvenile, but as to his non-confinement, and or prosecution, for an alleged offense.

B. The Ninth Circuit properly applied the decision of this court in Davis v. Alaska, 415 U. S. 308 (1974).

The Ninth Circuit properly applied the doctrine of the *Davis* case when they held that counsel for the Defendant was denied the right to show *why* (emphasis added) Brad Azbill might have been biased or lacked that degree of impartiality expected of a witness at a trial. As the Circuit Court properly held, trial counsel made consistent, vigorous efforts at the trial and in the Supreme Court of the State of Nevada to overturn the restrictions on the cross-examination.

Petitioner herein misconceives the position of Respondent when he contends that the necessity for going into the facts of the alleged juvenile offense only arose if Brad Azbill denied he had received or believed he had received help from the District Attorney in return for his testimony. Even if Brad Azbill did admit he did believe he received help, it was necessary for the Defendant to show when this belief was formed and the seriousness of the offense for which leniency was being given in order to argue to the jury the reason for his drastic change of testimony which occurred between the date of his first testimony, which in effect corroborated the testimony of the coroner's pathologist that the probable cause of death was the synergistic effect of drugs and alcohol, and that the

victim was dead before the fire started, and Brad Azbill's later testimony which was strictly contrary to this theory of the State's pathologists (acting coroners).

The position of the Petitioner that Defense did not call a witness to testify that Brad Azbill had told him the District Attorney went to bat for him to buttress their position is untenable. Counsel for Defense was not permitted to call such witness and ask him for what offense the District Attorney went to bat for Brad Azbill. Counsel for Respondent did, however, make an offer of proof of such fact at the trial.

The trial court effectively placed the Respondent in a position from which he could not extricate himself. If Brad Azbill denied he was under the impression he was getting leniency, impeachment evidence could not be introduced; if Brad Azbill admitted he was expecting leniency, Respondent was precluded from showing the nature and seriousness of the offense and when it occurred in order to show a reason for his drastic change of testimony from that originally given before the Grand Jury and that given at the preliminary hearing and trial of Sylvester Azbill.

—o—

CONCLUSION

A Writ of Certiorari should not issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted this 12th day of August, 1976.

Respectfully submitted,
HARRY E. CLAIBORNE
Counsel for Respondent

CERTIFICATE OF MAILING

I, GEORGE COCKLE, of COCKLE PRINTING COMPANY, in Omaha, Nebraska, do hereby certify that on the 13th day of August, 1976, I mailed 40 copies of Respondent's Objection to Petition For Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit, to: the Clerk of the Supreme Court of the United States in Washington D. C., and mailed two (2) copies of the same to Petitioner's counsel: Robert List, Attorney General of Nevada, Supreme Court Building, Capitol Complex, Carson City, Nevada 89710.

George Cockle

GEORGE COCKLE